IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 9, 2006 Session

JACK TROTTER, ET AL. v. GRAND LODGE F. & A.M. OF TENNESSEE

Appeal from the Circuit Court for Hamilton County
No. 2C337 L. Marie Williams, Judge

No. E2005-00416-COA-R3-CV - FILED MARCH 6, 2006

The plaintiff in this case sued the fraternal organization of which he was a member for defamation and violation of due process in connection with his removal from an administrative office he held in one of the organization's lodges. The plaintiff alleged defamatory statements related to his removal were contained in a letter and dispensation read to members of the organization and in a pamphlet subsequently distributed at the organization's annual meeting. The trial court granted the defendant's motion for summary judgment. We affirm summary judgment in part upon grounds that the allegedly defamatory statements contained in the letter and dispensation were not published and upon grounds that the plaintiff failed to present any evidence showing that the defendant's actions were state actions or actions taken under color of state law as is required in a cause of action for violation of due process. We reverse summary judgment in part upon grounds that a factual issue exists as to whether the allegedly defamatory statements contained in the pamphlet were published and/or were conditionally privileged.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Robert P. Rayburn, Chattanooga, Tennessee, for the appellant, Jack Trotter.

Reba Brown and Samuel L. Jackson, Nashville, Tennessee, for the appellee, Grand Lodge F. & A.M. of Tennessee.

OPINION

I. Background

This appeal involves a complaint for slander and libel against the appellee Grand Lodge F. & A.M.[1] of Tennessee ("Grand Lodge"), a nonprofit fraternal organization located in Davidson County, Tennessee. The complaint was filed by Jack Trotter, a former secretary of Whorley Lodge #601 ("Whorley Lodge"), a subordinate lodge of the appellee located in Hamilton County, Tennessee.

Mr. Trotter was elected to serve a one-year term as secretary of Whorley Lodge, where he was a member. Thereafter, on December 5, 2001, a meeting of members was convened at Whorley Lodge. According to Grand Lodge, the purpose of this meeting was to address various issues pending at Whorley Lodge, including disputes with regard to the documentation of expenditures and receipts related to fund-raising barbeques and with regard to whether a member's demit[2] had been properly acted upon by Whorley Lodge officers. Grand Lodge also asserts that there was general disharmony among the Whorley Lodge membership and this problem was also addressed at the meeting. Mr. Trotter contends that the dispute regarding barbecue funds was the only dispute pending and further disagrees that there was general disharmony among the membership. The meeting was attended by Esco Owens, who was serving as the Tennessee grand master of the organization, and by Alvin Hill, secretary of the Grand Lodge. Mr. Hill attested that when the meeting concluded, he felt that the problems addressed would be resolved; however, he later received reports that discord among the members of Whorley Lodge continued and that other problems, such as the failure of officers to approve requested membership transfers, persisted. Mr. Hill relayed this information to Mr. Owens and, by letter dated January 13, 2002, Mr. Owens removed Mr. Trotter from his position as secretary along with lodge treasurer, Don Ford, and lodge master, James Askins. The letter of removal stated that "the Whorley Lodge Officers have not fulfilled their commitments, the Lodge Annual Return has not been filed with the Grand Secretary and is now late, and the Lodge has refused to issue a demit to a Brother who is rightfully entitled to the receipt thereof." The letter was accompanied by a dispensation signed by Mr. Owens stating that removal of the officers was based on "good cause having been shown." Mr. Trotter attested that the reasons for his removal as stated by Grand Lodge were either false or not applicable to him. On January 15, 2002, a meeting of members was held at Whorley Lodge, and the letter and dispensation were read into the lodge record.

On January 22, 2002, Mr. Trotter and Mr. Ford[3] filed a complaint in the Hamilton County Chancery Court alleging that false statements made by Grand Lodge during the meeting of January 15, 2002, and contained in the letter and dispensation "defamed each of the plaintiffs and slandered

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[1] These initials denote "Free and Accepted Masons."

[2] Transfer of membership from one subordinate lodge to another.

[3] Mr. Ford's claims against Grand Lodge were settled, and Mr. Ford is not a party to this appeal.

their names" and "held each of the plaintiffs up to ridicule and contempt and wrongfully caused them to suffer extreme embarrassment, humiliation and mental anguish." The complaint further asserted that the actions of Grand Lodge "were arbitrary, capricious and in violation of the plaintiffs' constitutional right to due process of law."

The plaintiffs also filed a motion for a restraining order enjoining Grand Lodge from holding a replacement election to fill their positions and requiring Grand Lodge to issue a letter retracting its letter of January 13, 2002, and reinstating the plaintiffs to their offices pending entry of final judgment. On February 5, 2002, an agreed order was entered restoring both plaintiffs to their prior positions. The order further decreed that both plaintiffs would resign from their offices on the date of the order's entry. Remaining issues were transferred to the Hamilton County Circuit Court.

Thereafter, at its annual meeting on March 15, 2002, Grand Lodge distributed a pamphlet entitled "Preliminary Pamphlet of Reports" ("the pamphlet") to the 1,500 attendees of the meeting. This pamphlet contained the following language:

DISPENSATIONS ISSUED

Elect and/or Install Officers

. . .

> Whorley No. 601 - 01/13/02, Elect and Install Worshipful Master, Treasurer, and Secretary. Worshipful Master, Treasurer, and Secretary were removed from office by the Most Worshipful Grand Master.

. . .

On September 2, 2004, Mr. Trotter amended his complaint to allege that he was further defamed by issuance of the pamphlet on March 15, 2002, and that Grand Lodge knew or should have known that the statement of his removal was false because it had agreed to entry of the February 5, 2002 order "which immediately restored each of the plaintiffs to their respective offices and then permitted them to resign from said offices, prior to publication of the [pamphlet]."

On January 11, 2004, upon motion of Grand Lodge, the trial court dismissed Mr. Trotter's case by summary judgment upon grounds that (1) there was no publication of the allegedly defamatory remarks by Grand Lodge; (2) the communications at issue were conditionally privileged; and (3) Mr. Trotter's former position as secretary of Whorley Lodge did not constitute a property interest protected by guarantees of due process. This appeal followed.

II. Issues

The issues we address in this appeal are restated as follows:

1) Did the trial court err in granting summary judgment with regard to Mr. Trotter's defamation claim upon grounds that Grand Lodge did not publish the statements alleged to be defamatory?

2) Did the trial court err in granting summary judgment with regard to Mr. Trotter's defamation claim upon grounds of conditional privilege?

3) Did the trial court err in granting summary judgment upon Mr. Trotter's due process claim?

III. Standard of Review

Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues. *See Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Airport Props. Ltd. v. Gulf Coast Dev., Inc.*, 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). They are appropriate only when the facts material to the dispositive legal issues are undisputed. Accordingly, they should not be used to resolve factual disputes or to determine the factual inferences that should be drawn from the evidence when those inferences are in dispute. *See Bellamy v. Federal Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988).

To be entitled to a summary judgment, the moving party must demonstrate that no genuine issues of material fact exist, and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d at 210; *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). A summary judgment should not be granted, however, when a genuine dispute exists with regard to any material fact. *Seavers v. Methodist Med. Ctr.*, 9 S.W.3d 86, 97 (Tenn. 1999); *Hogins v. Ross*, 988 S.W.2d 685, 689 (Tenn. Ct. App. 1998). Our task on appeal is to review the record to determine whether the requirements for granting summary judgment have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997). Tenn. R. Civ. P. 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d at 210; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). A party seeking a summary judgment must demonstrate the absence of any genuine and material factual issues. *Byrd v. Hall*, 847 S.W.2d at 214.

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd v. Hall*, 847 S.W.2d at 215;

Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn. 1997). The non-moving party may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials (depositions, answers to interrogatories, and admissions on file) provided by Rule 56.06 showing that there is a genuine issue for trial. If the non-moving party does not so respond, then summary judgment, if appropriate, shall be entered against the non-moving party. Tenn. R. Civ. P. 56.06.

Summary judgments do not enjoy a presumption of correctness on appeal. *See Nelson v. Martin*, 958 S.W.2d 643, 646 (Tenn. 1997); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997). Accordingly, when we review a summary judgment, we view all the evidence in the light most favorable to the non-movant, and we resolve all factual inferences in the non-movant's favor. *See Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox County Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn. 1999). A summary judgment will be upheld only when the undisputed facts reasonably support one conclusion - that the moving party is entitled to a judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). We will affirm a summary judgment on different grounds than those relied on by the trial court upon our determination that the trial court reached the correct result. *Clark v. Metropolitan Government of Nashville and Davidson County*, 827 S.W.2d 312 (Tenn. Ct. App. 1992).

IV. Defamation

This case involves claims for slander and libel, both of which are forms of defamation. In *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 820 (Tenn. 1994), the Tennessee Supreme Court noted that the basis for an action for defamation, whether it be slander or libel, is that the defamation has resulted in an injury to the person's character and reputation. It is well established in this state and elsewhere that in order to establish a *prima facie* case of defamation, a plaintiff must show that: "1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 571 (Tenn. 1999).

A. Publication

The first issue we address is whether the trial court properly granted summary judgment on grounds that the statements alleged to be defamatory were not "published" by Grand Lodge.

As noted by the Court in *Sullivan*, "'Publication' is a term of art meaning the communication of defamatory matter to a third person." *Id.* at 571. In his brief, Mr. Trotter argues that evidence was presented in this case establishing a genuine issue of material fact as to whether the statements in question were published:

> There was no dispute that the Appellee mailed a letter on January 13, 2002, along with a dispensation that stated the Appellant had

> committed three (3) acts of official malfeasance, which required his removal from office. These documents were read/published to the membership of Whorley Lodge #601 per the instructions of the Appellee. Thereafter, subsequent to filing his lawsuit, the Appellant was restored to his office of secretary and permitted to resign from this office on February 5, 2002. On March 15, 2002, the Appellee published and distributed a Preliminary Pamphlet of Reports, which stated that the Appellant was removed from office by the Most Worshipful Grand Master, to approximately 1,500 attendees at the Appellee's annual meeting that took place on March 27-28, 2002. The Appellant's affidavit created a question of material fact on whether the publication of the pamphlet to the 1,500 attendees at the annual meeting defamed, libeled and slandered his name in the Masonic and **general community**.

(references to record omitted);(emphasis in original).

Grand Lodge asserts that, under Tennessee law, communication of an allegedly defamatory matter between agents and officers in a nonprofit organization does not constitute a publication. In support, Grand Lodge cites *Siegfried v. Grand Krewe of Sphinx, et al.*, No. W2002-02246-COA-R3-CV, 2003 WL 22888908 (Tenn. Ct. App. W.S. filed Dec. 2, 2003). In *Siegfried*, the chairman of the Grand Krewe of Sphinx, a not-for-profit social organization, charged the plaintiff, a member of the organization, with violation of its by-laws and distributed a letter to all voting members of the organization notifying them of the specific charges. The plaintiff's subsequent complaint for defamation was dismissed by summary judgment. Affirming the summary judgment, we referenced the well-settled rule that "communication between officers and agents of a corporation ... is not publication of libelous matter" (citing *Freeman v. Dayton Scale Co.*, 19 S.W.2d 255, 257 (Tenn. 1929)). We determined no basis for distinguishing between not-for-profit corporations and other corporations as to the rule's applicability. Upon our finding that the letter containing the alleged defamatory statements was only sent to the voting members of the organization and never left the corporate structure, we concluded that no communication to a third party had taken place and, therefore, there had been no publication.

Applying the analysis implemented in *Siegfried,* we now examine the record in the case *sub judice* to determine if a genuine issue exists as to whether Grand Lodge disseminated the allegedly defamatory statements to any parties other than lodge members and as to whether Grand Lodge disseminated the statements outside the structure of the organization.

Mr. Trotter's complaint indicated two separate incidents he apparently alleges constituted publication in this case. The first of these pertains to actions of Grand Lodge that took place in January of 2002, described in Mr. Trotter's complaint as follows:

> On January 13, 2002, the defendant through its Grand Master, Esco L. Owens, drafted and forwarded a letter and a Dispensation to Ruben G. Skipper, Jr., Senior Warden of Whorley Lodge 601, which ordered Whorley Lodge 601 and its members to immediately remove Brother James Glen Askins and the plaintiffs from the offices to which they had been elected and installed for 2002, and to hold a replacement election on February 5, 2002. In addition, on January 15, 2002, the defendant ordered Whorley Lodge 601 to notify all of its members by letter of the removal of these officers and the replacement election. Further, on January 18, 2002, Whorley Lodge 601 mailed the letter ordered by the defendant to its members with an effective date of January 13, 2002.

The complaint contained no allegations that, in January of 2002, information regarding Mr. Trotter's removal from office was communicated to any parties other than the members of Whorley Lodge or was communicated outside the organization's structure, and we find no evidence in the record that would support such a conclusion. Accordingly, it is our determination that this information was not published and that Mr. Trotter's cause of action for defamation in that regard was properly dismissed by summary judgment.

The other action of Grand Lodge that Mr. Trotter contends constituted publication was its distribution of the Preliminary Pamphlet of Reports at its annual meeting in March of 2002. An essential element of Mr. Trotter's proof was publication of the alleged defamatory statement. In order to succeed on its motion for summary judgment, Grand Lodge was required to affirmatively negate the fact of publication. Grand Lodge failed to do so. The critical factual determination in this regard is whether the pamphlet was disseminated at the annual meeting *only* to members of the organization *or* to members of the organization *and* nonmembers. Grand Lodge's proof on this issue consisted of the following statement from the deposition of Mr. Owens:

> Q. Let me ask you in general terms how many people would have access to this pamphlet at the annual grand meeting or annual meeting of the Grand Lodge, if you know?
>
> A. *Everybody that comes in gets one*. That is the program meeting.
>
> Q. Do you know how many *people* attended the annual meeting in March of 2002?
>
> A. I don't know.
>
> Q. Do you have any idea?
>
> A. Maybe 15-, 1,600 maybe.

(emphasis added).

Grand Lodge failed to introduce proof that only members of the organization attended the annual meeting. In opposition to the motion for summary judgment, Mr. Trotter attested by affidavit that the pamphlet was "distributed to 1,500 members of *the Masonic community*"(emphasis added). While it is unclear exactly what group the words "Masonic community" describe, elsewhere in his affidavit Mr. Trotter stated that the actions of Grand Lodge "left the members of the lodge, the Masonic community and the general public free to speculate." Thus, Mr. Trotter distinguished between "members of the lodge" and "the Masonic community." Although in its final order, the trial court stated that "[c]ommunication and publication was only to members of the Masonic fraternity," we find that Mr. Trotter's affidavit created an issue of fact as to whether the information objected to was communicated to persons other than members. We must view the evidence in the light most favorable to Mr. Trotter. Because it is conceivable that "Masonic community" includes nonmembers, we hold the trial court erred in granting summary judgment with regard to the pamphlet on the basis of nonpublication.

B. Conditional Privilege

The next issue we address is whether the trial court correctly ruled that the communications objected to by Mr. Trotter were conditionally privileged. In its final order the trial court stated as follows:

> Defendant also contends the communication at issue was conditionally privileged. For a conditional privilege to attach, the communication must be made in good faith and made concerning subject matter in which both the party communicating and the party receiving the information have an interest and a duty exists for the communication to take place. The rationale is similar to that of the publication in that those with a need to know because of their relationship have a duty to keep each other fully informed. For a conditionally privileged communication to be actionable, the plaintiffs must show actual or express malice. Plaintiffs contend there was a reckless disregard for the truth which results in malice. The Court finds the malice element is absent and the conditional privilege attaches.

Mr. Trotter does not address the trial court's finding as to the absence of express malice and argues instead that the communications of Grand Lodge were not conditionally privileged. Having determined that the trial court properly dismissed Mr. Trotter's claim that the communications to members of the organization in January of 2002 were not published, we need not determine whether those particular communications were also conditionally privileged. Thus, our sole focus of inquiry is whether the communication of Mr. Trotter's removal, as set forth in the pamphlet that Grand Lodge distributed at the organization's annual meeting, was conditionally privileged.

A "conditional" or "qualified" privilege exists with respect to communications "where the interest which the defendant is seeking to vindicate or further is regarded as sufficiently important to justify some latitude for making mistakes." *See Pate v. Service Merchandise Co., Inc.*, 959 S.W.2d 569, 575-576 (Tenn. Ct. App. 1996). In *Southern Ice Co. v. Black*, 189 S.W. 861, 863 (Tenn. 1916), the Tennessee Supreme Court described circumstances giving rise to this privilege:

> Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. The rule announced is necessary in order that full and unrestricted communication concerning a matter in which the parties have an interest or a duty may be had. It is grounded in public policy as well as reason.

(citations omitted).

As we have noted, Mr. Trotter attested that the pamphlet was distributed to "members of the Masonic community" and, as we have further indicated, a factual question remains as to what specific group of persons is indicated by the phrase "Masonic community." Until this question is answered, it is not possible to determine whether Mr. Trotter's removal from office was a matter with reference to which Grand Lodge and such persons had a corresponding interest and a finding of conditional privilege is premature. "[I]t is exclusively for the Judge to determine whether the occasion on which the original defamatory statement was made was such as to render the communication a privileged one." *Price v. Sale*, 8 Tenn.C.C.A. 382, 396 (1918). However, in this case that determination cannot be made until the constituency of the Masonic community has been established as a matter of fact. Accordingly, we conclude that the trial court erred in ruling that Grand Lodge was entitled to summary judgment upon grounds of conditional privilege. Upon remand, the trier of fact shall resolve the issue of to whom the pamphlet was distributed at the annual meeting on March 15, 2002, after which the trial court shall determine if such distribution was conditionally privileged.

V. Due Process

The remaining issue we address is the propriety of the trial court's summary judgment dismissal of Mr. Trotter's claim that his removal from office as secretary of Whorley Lodge constituted a violation of his rights of due process.

Mr. Trotter contends that the actions taken by Grand Lodge in association with his removal from office wrongfully deprived him of valuable property rights without due process of law. In this regard, his complaint provided as follows:

> The plaintiffs aver that the actions of the defendant were taken without fair and adequate notice of the order[4] and Dispensation dated January 13, 2002, or the action to be taken thereunder; without any proffering of charges; without any opportunity to respond to said order or Dispensation; without any opportunity offer proof or a defense in opposition to the order or Dispensation; without a clear statement of the reason/s or charge/s that precipitated the order or Dispensation; without a clear statement of any violation of Masonic law; and without a hearing or trial.
> In summary, the actions of the defendant, as described herein, were arbitrary, capricious and in violation of the plaintiffs' constitutional right to due process of law.

The first section of the Fourteenth Amendment of the United States Constitution provides in part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 8 of the Tennessee Constitution declares,

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

In *State v. Hale*, 840 S.W.2d 307, 312 (Tenn. 1992) the Tennessee Supreme Court stated that the phrase, 'the law of the land,' as used in Article I, section 8 of the Tennessee Constitution and the phrase, 'due process of law,' as used in the Fourteenth Amendment to the Constitution of the United States, are synonymous. Both the Due Process Clause of the Fourteenth Amendment and Article I, Section 8 of the Tennessee Constitution protect property and liberty interests from abridgment under color of state law. *Mid-South Indoor Horse Racing, Inc. v. Tennessee State Racing Commission*, 798 S.W.2d 531,540 (Tenn. Ct. App. 1990). However, neither the State Constitution nor the Federal Constitution guarantees a plaintiff protection from purely private actions. "State action" is necessary to invoke due process protection of both the Fourteenth Amendment and Article I, Section 8. *See Bryant, M.D. v. Tenet, Inc.*, 969 S.W.2d 923, 925 (Tenn. Ct. App. 1997). In the instant case, Mr. Trotter admitted that he based his entire due process claim on the book entitled the Tennessee

[4]Review of the complaint shows that the referenced "order" is the letter from the grand master ordering the members of Whorley Lodge to remove Mr. Trotter and the other plaintiff from their offices.

Masonic Code and the by-laws of Whorley Lodge. He does not allege that any of the actions of which he complained were "state actions" or actions taken under color of state law, and the record presents no proof to that effect. Consequently, Mr. Trotter's cause of action for violation of rights of due process fails as a matter of law.

VI. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court in part, reverse in part, and remand for further action as necessary consistent with this opinion. Costs of appeal are adjudged against the appellant, Jack Trotter and the appellee, Grand Lodge F. & A.M. of Tennessee, equally.

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SHARON G. LEE, JUDGE